88-1200

No.

FILED
JAN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1988

ERNEST P. LAMPERT, DELPHINE LAMPERT,
ROBERT BURNS, and JOHN P. THORNE
and
MANUAL PEINADO
and
LAWRENCE J. FIGUR
*Petitioners,*

VS.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MONTIE S. DAY
DAY LAW CORPORATION
80 Swan Way, Suite 340
Oakland, California 94621-1443
Telephone: (415) 638-6100
*Counsel for Petitioners*

## QUESTIONS PRESENTED

1. Does Title 26, U.S.C. Section 6103, which provides that no employee or officer of the United States shall disclose tax return information except as authorized by statute, prohibit an employee or officer of the United States to disclose tax return information which is otherwise a public record and/or not confidential and is not one of the specifically enumerated exceptions authorized by Congress?

2. Are the courts bound by the terms and words employed in Title 26, U.S.C. Section 6103, where the statute clearly enumerates specific exceptions to the general rule prohibiting disclosure of tax return information, and the exceptions do not include the disclosure of tax return information that is part of a public record or otherwise not confidential?

## LIST OF PARTIES

The parties to the instant proceedings are Ernest P. Lampert, Delphine Lampert, Robert Burns, John P. Thorne, Manual Peinado, and Lawrence J. Figur, petitioners, and the United States of America, the respondent. The District Court proceeding consisted of three separate actions, but were consolidated by the Ninth Circuit Court of Appeals for argument and decision. The parties at the District Court for each action included the following:

Lampert et. al. v. United States of America, N. D. Cal. CV-86-3463 (1987)

Plaintiffs: Ernest P. Lampert, Delphine Lampert, Robert Burns, and John P. Thorne
Defendant: United States of America

Peinado v. United States of America, N. D. Cal. CV-87-0075 (1987)

Plantiff: Manual Peinado
Defendant: United States of America

Figur v. United States of America N.D. Cal. CV-87-0737-SC (1987)

Plaintiff: Lawrence J. Figur
Defendant: United States of America

The parties in this Court are the same parties in the district court actions, except that in Lampert et. al. v. United States, the original parties also included United Energy Corporation and Renewable Power Corporation as plaintiffs. United Energy Corporation and Renewable Power Corporation dismissed their claims in the district court, and were not a party to the district court proceedings at the time of the summary judgment. There are no other known parties in interest.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

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ERNEST P. LAMPERT, DELPHINE LAMPERT, ROBERT BURNS, and JOHN P. THORN, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

---

MANUAL PEINADO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

---

LAWRENCE J. FIGUR, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners respectively pray that a writ of certiorari issue to review the judgment and opinion of the United

States Court of Appeal for the Ninth Circuit entered in this matter on August 12, 1988. (Appendix A hereto)

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 854 F. 2d 335. It is reprinted beginning at page 1 in Appendix A to this petition. The order of the Court of Appeals denying the petition for rehearing is attached hereto as Appendix B. The opinions of the District Court for the Northern District of California may be found as follows:

Lampert et. al. v. United States, 87-1 U.S.T.C. (CCH) para. 9361 (N.D. Cal. 1987)-Appendix C hereto.

Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987)-Appendix D hereto.

Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987)-Appendix E hereto.

## JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was filed on August 12, 1988. A timely petition for rehearing was denied on October 21, 1988. (Appendix B hereto) This Court has jurisdiction to review the judgements and opinions of the Court of Appeals pursuant to 28 U.S.C. Sec. 1254(1) and 2101(c).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Const., Article I, Sec. 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Title 26, U.S.C. Section 6103

26 U.S.C. Section 6103(a) provides, in pertinent part:

> "(a) Return and return information shall be confidential, and except as authorized by this title-
> (1) no officer or employee of the United States,...shall disclose

any return or return information obtained by him in any manner in connection with his service as such officer or an employee or otherwise under the provision of this section."

26 U.S.C. Section 6103 (b)(2) defines "return information" to specifically include:

"... a taxpayer's identity, the nature, source, or amounts of his income,...deductions,...credits..., liabilities,...deficiencies, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability...of any person...or any tax, penalty, interest, fine, forfeiture, or other imposition, or offense..."

26 U.S.C. Section 6103(b)(8) defines the term "disclosure":

"...the making known to any person in any manner whatsoever a return or return information."

Title 26, U.S.C. Section 7431(a)(1):

> "If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States."

## STATEMENT OF THE CASE

### A. THE DISTRICT COURT ACTION

#### Ernest P. Lampert, Delphine Lampert, Robert Burns and John P. Thorne

On June 3, 1986, the respondent, through its Department of Justice, filed a civil action against petitioners Ernest Lampert, Delphine Lampert, Robert Burns, and John Thorne relating to an investigation and examination conducted by the Internal Revenue Service ("I.R.S."). The allegations in the complaint were based upon information or data collected or contained in the files and records of the I.R.S. On the very same day, both the

U.S. Attorney and the I.R.S. issued press releases intended to disclose to the general public the return information relating to the petitioners, including the petitioners' identity, the fact that petitioners were suspected of promoting a fraud in the form of a "Ponzi Scheme", that petitioners were suspected of promoting an abusive tax shelter, that Ernest Lampert was president of United Energy Corporation ("U.E.C."), that Delphine Lampert was the sole shareholder of U.E.C., that John Thorne and Robert Burns were employees of U.E.C., that the complaint was the result of a 15 month investigation concerning petitioners, the locations of petitioners' residences (city of residence), and the nature of relief and penalties the respondent was seeking. (CR-1, Exhibits A and B, Lampert

Excerpt of Record)[1]

Petitioners Lamperts, Burns, and Thorne filed an action contending that the out-of-court disclosure of their "return information" through the press releases constituted a violation of Title 26, U.S. C. Section 6103 ("Section 6103"), and entitling them to damages pursuant to Title 26, U.S.C. Section 7431 ("Section 7431").

The government moved for summary judgement on the grounds that there had been no "unauthorized disclosure" in that the return information was already a matter of public record, and that, in any event, the disclosures were a result of a "good faith" but erroneous interpretation of statute.

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(1) Reference in this Petition to the Clerk's Record is by the number of the document as "C.R.". The "Excerpt of Record" is filed with the Court of Appeal, and hereafter referred to as "Excerpt" as to each petitioner.

The petitioners moved by cross-motion for summary judgment, contending that the disclosures were "unauthorized disclosures", and that "good faith" could not exist where the disclosing officer admitted he did not read or interpret the statute.

On April 4, 1987, the district court granted the government's motion for summary judgment on the grounds that there was a "good faith" interpretation of the statute. The district court did not reach the issue of whether there was a violation of Section 6103 in making the disclosures of return information. (Appendix C, Opinion)

Manual Peinado

Manual Peinado was indicted on Federal criminal tax charges, and following the indictment and a plea of guilty, the Untied States issued a press

release containing "return information" relating to Peinado's identity, sources of income, occupation, residence, and other tax data which reflected information either furnished to the I.R.S. or contained in the I.R.S.'s files. (CR-9, Exhibits D & E, Peinado Excerpt)

Peinado was a licensed realtor in California, and in exchange for a plea bargain, Assistant U.S. Attorney Robert Fourr assured Peinado that the government was not out to damage his professional and business reputation. Therefore, the Assistant U.S. Attorney agreed, as part of the plea bargain, to write a letter on behalf of Mr. Peinado for use before the State of California Department of Real Estate to minimize any potential damage to Mr. Peinado's business reputation. The government never disclosed its intention to issue the press release and publicize petitioners' "return information". As a

result of the dissemination to the general public of his tax return information through the press release, Peinado filed an action seeking damages pursuant to Section 6103 and 7431. (CR-1, 14, 15. Peinado Excerpts)

The district court granted the governments' motion for summary judgment on the ground that, although the press release contained "return information", there was no disclosure within the meaning of Section 6103 where return information contained in the press release was also in the public records and court files. (Appendix D hereto)

Lawrence Figur

Lawrence Figur, like Peinado, was a professional, being a Certified Public Accountant. Like Peinado, Figur was indicted, and entered a plea as a result of a plea bargain with Assistant U.S. Attorney Robert Fourr which included

assurances that the United States would not attempt to damage his professional reputation. Mr. Fourr, like he did in Peinado, agreed that he would, in fact, write a letter on Mr. Figur's behalf to the California Board of Accountancy in order to mitigate against damages to Figur's professional license and reputation. After the indictment and plea of guilty, Mr. Fourr caused a press release to be issued containing Figur's "return information", including the penalty he faced, the amounts of income reported and alleged unreported, the sources of his income, and other data collected by I.R.S.'s agents or originating in the files of the I.R.S. (CR-1, 10, 12, Figur Excerpt)

Figur filed an action for the out-of-court disclosure of his return information. The district court granted the government's motion for summary

judgment finding there had been no unauthorized disclosure because the information was contained in the public records. (Appendix E hereto)

B. THE NINTH CIRCUIT ACTION

The three separate district court actions were consolidated by the Ninth Circuit Court of Appeals ("Ninth Circuit") for arguments and decision. On August 12, 1988, the Court of Appeals filed its opinion holding that, in all cases, Section 6103 does not create a general prohibition against public disclosure of tax information so that once return information is made a part of the public domain or not "confidential", such information no longer has the protection of Section 6103 and subject to disclosure by I.R.S. employees, even in a press release. Thus, according to the Ninth Circuit, there would be no violation of Section 6103 for government

employees to disclose return information also located in the public records. The Ninth Circuit further noted that the technical reading of the statute supports the petitioners' position, but stated while there is a general duty of the Courts to give effect to the literal language and words of the statute, the Court is not obligated to do so where the statute as worded would defeat the purpose of the statute.(2)

On August 26, 1988, petitioners, and each of them, filed with the Ninth Circuit a Petition for Rehearing, which was denied on October 21, 1988. (Appendix B hereto)

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(2) As to petitioners Lamperts, Burns and Thorne, the Ninth Circuit affirmed the judgment on the basis that no violation of Section 6103 occurred, and did not consider or rule upon the issue of "good faith". Thus, the "good faith" issue is not ripe for review by this Court, and should remanded if this Court reverses the issue presented herein.

## REASONS FOR GRANTING THE WRIT

### I. The Split Among the Circuit Courts as well as the District Courts Presents an Important Unresolved Question

As of this date, there appears to be a split among the circuit courts with respect to whether "confidentiality" is an issue in interpreting Section 6103 so that, if the return information is contained in the public records, a disclosure of such return information by a government employee would not be a violation of Section 6103.

In Rogers v. Hyatt, 697 F.2d 899 (10th Cir. 1983), an I.R.S. agent disclosed certain return information which had been the subject of court testimony, and therefore contained in the "public record". The Tenth Circuit held that "(e)ven assuming the loss of confidentiality in the content of the statements, the (later) disclosure was clearly unauthorized" Id. at 906. The

fact that the taxpayer caused the information to be part of public record was of no concern in that Section 6103 did not authorize the discourse of any return information, even if it was a part of a public record, except as specifically authorized by statute. The court held the issue of the "loss of confidentiality" need not be even reached so that any disclosure (unless specifically authorized by statute) would violate Section 6103. Id. at 904, 906.

The Ninth Circuit held otherwise, stating the government may disclose all non-confidential return information.

The district courts are also divided. In Johnson v. Sawyer, 640 F.Supp. 1126 (S.D. Tex. 1986), the I.R.S. issued a press release containing return information of a taxpayer regarding his criminal prosecution. The Court held

that, "Congress made the language of Sec. 6103 quite clear; any disclosure of return information is illegal `except as authorized...'". Id. at 1132. Since the language used by Congress was clear and there was no exception in the statute, they found a violation of Section 6103.

In Malis v. United States, 87-1 U.S.T.C. para. 9212 (C.D. Cal. 1986), the district court held the United States liable for return information which was disclosed and which was already contained in Court files, citing Rogers v. Hyatt, supra, for the proposition that disclosure of return information that has been made public does not preclude liability for later unauthorized disclosure of the identical return information by government employees.

In Husby v. United States, 672 F.Supp. 442 (N.D. Cal. 1987), the same district court that decided the instant

actions subsequently (by dicta) noted the fact that return information may not be disclosed notwithstanding the fact that it is public record, relying on Rogers v. Hyatt, supra. Id. at 444, n.1.

In Thomas v. United States, 671 F.Supp. 15 (E.D. Wis. 1987), the district court arrived at an opposite result citing the instant actions and concluding that a press release issued by the United States summarizing a tax court proceeding is not an unauthorized disclosure.

With the courts clearly divided, and considering the number of taxpayers whose rights and remedies with respect to the tax laws may be effected, this Court should grant the writ to resolve this important conflict.

II. The Standard of Interpretation of the Statute by the Ninth Circuit has Departed from the Accepted and Usual Course of Judicial Proceedings

It is for the Congress of the United States to make the laws necessary for the government, and the Court are not empowered to add to or to take from the law. The exclusive power to make laws lies with Congress. U.S. Const., Article 1. This Court has consistently recognized a principal that where a statute is clear on its face, it is unnecessary to look to its legislative history to discern its meaning and scope. Tennessee Valley Authority v. Hill, 437 U.S. 183, 184 n. 29 (1978). When the court finds the "terms of a statute unambiguous, judicial inquiry is complete." Burlington Northern R.R. Co. v. Oklahoma Tax Comm'r, ____ U.S. ____, 107 S. Ct. 1855, 1860 (1987)(quoting from Rubin v. United States, 449 U.S. 424, 430 (1981)). The Court is to look first to the statutory language, and then to the

legislative history if the statutory language is unclear. Mobil Sales and Supply Corp. v. Panamax Venus, 804 F.2d 541, 542 (9th Cir. 1986) The terms of a statute must be tested on the terms and basis of the words employed, interpreting such words where possible in their ordinary, everyday senses. Shelton v. Tucker, 364 U.S. 479 (1960); Hanover Bank v. Commissioner, 369 U.S. 672, 687-688 (1961). The fact that Congress might have acted with greater clarity or foresight does not give the courts carte blanche to redraft statutes in an effort to achieve that which Congress might have perceived to have failed to do, nor is the judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words would lead to a harsh result. United States v. Locke, 474 U.S. 84, 95 (1985).

In enacting Section 6103, Congress provided by clear and unambiguous language that "...except as authorized by this title---no officer or employee of the United States...shall disclose any return or return information..." Congress could not have possibly made the statute more clear.

As the Ninth Circuit found, "(t)here is no dispute here that the press releases disclosed `return information' as defined by section 6103." Opinion, Appendix A, p. A-5. Likewise, there can be no dispute that the government disclosed the return information "in any manner", which would include a press releases. Thus, the only question is whether there is an applicable exception within Section 6103. The exception argued by the government, Section 6103(h)(4), is not applicable as the disclosure in the form of a press

releases is, of course, not a disclosure in a judicial proceedings.

The Ninth Circuit acknowledged that "a strict, technical reading of the statute supports the taxpayers' position." Opinion, Appendix A, p. A-8. The court, however, refused to follow the clear and unambiguous words employed by Congress in the statute, and instead engaged in a re-write of the statute to provide an exception that Congress did not previously provide.

In the instant case, the words employed by Congress in the statute are clear and unambiguous, and judicial inquiry should go no further. As the Court in Johnson v. Sawyer, supra, pointed out, "Congress made the language of Sec. 6103 quite clear; any disclosure of return information is illegal 'except as authorized...", and that "(i)f the result is poor public policy, it is for

Congress---not the Court--- to amend Sec. 6103 to allow the issuing of a press release." Id. at 1132, 1133. Accord, Roger v. Hyatt, supra.

Furthermore, Section 6103(b)(2) specifically refers to "return information" as encompassing "any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary", and does not state that the term "return information" is restricted to confidential information. All "return information" is subject to disclosure only when authorized by the "exceptions" enumerated by Congress in Section 6103.

The Ninth Circuit compounded the error by implying an intent of Congress where the Congressional record did demonstrate such an intent. In fact, the Congressional record is to the contrary, stating that return information "shall be treated as confidential." Joint

Committee Explanation on P.L. 94-455, 1976-3 C.B. 327. This language presupposes that not all "return information" is confidential, but "shall be treated" as confidential. "Confidentiality" becomes a duty of a government employee and establishes a standard of conduct for government employees set by Congress, and does not describe the "return information" itself.

The interpretation given the statute by the Ninth Circuit is in contravention of the clear and unambiguous words used in the statute, and is a serious departure from the accepted and usual course of judicial interpretation of statutes. As a result, the Ninth Circuit's interpretation seriously undermines the protection of the law afforded taxpayers and citizens of the United States and ventures into the area of "legislation", not interpretation of

the law. The writ should be granted to resolve the interpretation and rectify the error of the Ninth Circuit's legislative attempt to create law.

III. The Ninth Circuit's Interpretation of the Statute is Not Only Erroneous, But Defeats the Purpose of the Statute and Essentially Destroys a Public Protected Statutory Right Effecting Virtually All Taxpaying Citizens

The Ninth Circuit's interpretation that only "confidential" information is protected would essentially destroy the intent of the statute. To require that the "return information" be "confidential" would essentially mean that anything contained in the I.R.S.'s records or virtually any data collected by or furnished to the I.R.S. may be disclosed with immunity from liability without regard to Sections 6103 and 7431.

Simply, there is very little in a taxpayer's life that is truly confidential, whether personal or financial. The

public records may reflect real estate owned, notes and deeds of trust owned, mortgages owned, the name of banks which the taxpayer borrows money or otherwise has transactions, money owed by a taxpayer in the form of mortgages or notes, and judgments against a taxpayer, ownership of corporations, financing statements, various business permits and licenses, cars owned by a taxpayer, and liens against the taxpayer's automobile. These matters, and many more are in the public records, and would not be confidential. Furthermore, the taxpayer would not be able to establish his source of income as "confidential" as the payor or employer knows the identity of the taxpayer and the amount of wages paid the taxpayer. Bank records as well as all financial records are not "confidential" in that bank personal have access to such documents. The family history of the

taxpayer losses protection in that birth, death, marriage, and divorce records are generally of public records. Thus, under the "confidentiality" requirement added to the statute by the Ninth Circuit, basically all return information which may be collected by or furnished to the I.R.S either from public records or other individuals may be disclosed.

The effect of the Ninth Circuit's holding in the instant action is to nullify the statute passed by Congress, and leave taxpayers at the mercy of the I.R.S. and government employees. This, in turn, defeats the very policies of protecting return information from unwarranted disclosure as Congress intended. Section 6103, according to its clear language, assures taxpayers that if information is provided to or obtained by the I.R.S., such information would be used solely for legitimate tax purposes

or other legitimate purposes, and would not be subject to unwarranted broadcast of the return information to the general community and public. The Ninth Circuit's interpretation defeats such protection, and a well advised taxpayer may well refuse to cooperate or provide the I.R.S. information, knowing that if it is not "confidential", he may next see the information in the newspapers.

The interpretation of the provision of Section 6103, and specifically the issue presented herein, is a matter of extreme public importance. First, the interpretation effects the rights of every citizen who files Federal income tax returns, or may be subject to investigation or examination by the I.R.S. Under the Ninth Circuit's holding in the instant action, virtually all information or data collected by or received by the I.R.S. or contained in

its files may be subject to release to the public upon a showing that the document or information is already known some third person, or is a matter of public record.

The I.R.S., with the Ninth Circuit's interpretation, is capable of issuing press releases with immunity with only a showing that the information is also contained in a public record, and thus may act to destroy individuals politically, financially, or personally with a "coloring" of an effective press release. It must be noted that while the isolated information contained in public records may not be "newsworthy", the same information assembled and colored in the bright lights of an I.R.S. press release make the information newsworthy. Such a technique is not becoming a tax system based upon laws, and does not endear to the public regard for the integrity of

the I.R.S.

Finally, the potential of abuse through disclosures that Congress intended to prohibit may (or at least should) make taxpayers less willing to cooperate with the I.R.S. While taxpayers may be more inclined to accept that certain disclosures are necessary where legitimate needs arise, disclosures of return information in situations where Congress specifically prohibited disclosures can do nothing but to undermine further - the taxpayer's confidence in the government and the I.R.S.

## CONCLUSION

In view of the clear language of the statute prohibiting disclosures of return information except as authorized by Congress, the Ninth Circuit's disregard of the clear statutory language, the

refusal to apply accepted and the usual course of judicial standards to the interpretation of the statue, the engaging in law making by re-writing the statute to include an exception not provided by Congress, all of which defeats a major public policy and the protections of of Section 6103, and in view of the conflict between the circuit courts, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Montie S. Day

Day Law Corporation
80 Sway Way, Suite 340
Oakland, California 94621
Tel: (415) 638-6100

Counsel for Petitioners

January 19, 1989

(Appendix follows)

**Appendix A**

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| ERNEST P. LAMPERT; DELPHINE LAMPERT; ROBERT J. BURNS; JOHN P. THORNE,<br>*Plaintiffs/Appellants,*<br>v.<br>UNITED STATES OF AMERICA,<br>*Defendant/Appellee.* | No. 87-2022<br>D.C. No.<br>CV-86-3463-RFP |
| MANUAL PEINADO,<br>*Plaintiff/Appellant,*<br>v.<br>UNITED STATES OF AMERICA,<br>*Defendant/Appellee.* | No. 87-2395<br>D.C. No.<br>CV-87-0075-WWS |
| LAWRENCE J. FIGUR,<br>*Plaintiff/Appellant,*<br>v.<br>UNITED STATES of AMERICA,<br>*Defendant/Appellee.* | No. 87-2396<br>D.C. No.<br>CV-87-0737-SC<br>OPINION |

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, Chief District Judge,
Presiding (87-2022)
William W. Schwarzer, District Judge, Presiding (87-2395)
Samuel Conti, District Judge, Presiding (87-2396)

Argued and Submitted
April 12, 1988—San Francisco, California

Filed August 12, 1988

Before: Otto R. Skopil, Jr. and Jerome Farris,* Circuit Judges, and James M. Burns,** District Judge.

Opinion by Judge Skopil

## SUMMARY

### Taxation/Torts

The court affirmed a judgment and held that tax return information lawfully disclosed in a judicial forum subsequently disclosed by press release does not violate 26 U.S.C. § 6103.

In this consolidated appeal, the taxpayers/appellants brought an action alleging that the government's press release concerning appellants' tax return information was an unauthorized disclosure of tax "return information" as defined by 26 U.S.C. § 6103. The government prevailed on motions for summary judgments.

[1] 26 U.S.C. § 6103(a) provides that returns and return information shall be confidential. [2] 26 U.S.C. § 6103(h)(4)(A) authorizes the disclosure of return information in judicial proceedings. The government argues that once such information is lawfully disclosed in judicial proceedings, it loses its

*Judge Anderson, an original member of this panel, died shortly after oral argument. Judge Farris was drawn to replace him.

**The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

confidentiality. [3] Taxpayers argue that section 6103(h)(4)(A) applies only to disclosures *in* judicial proceedings. [4] Section 6103 dos not create a general prohibition against public disclosure of tax information. [5] Congress sought to prohibit only the disclosure of confidential tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information.

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## COUNSEL

Montie S. Day and Jon R. Vaught of Day Law Corporation, Oakland, California for the plaintiffs-appellants.

William S. Rose, Jr., Assistant Attorney General, and Mary F. Clark, Department of Justice, Washington, D.C., for the defendant-appellee.

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## OPINION

SKOPIL, Circuit Judge:

We must decide in these consolidated appeals whether press releases by government officials, relating to public judicial proceedings, constitute unauthorized disclosures of "tax return information" in violation of 26 U.S.C. § 6103 (1982) of the Internal Revenue Code. We agree with the district courts that the press releases here do not violate section 6103. We need not reach the government's alternative theory that the "good faith" exception of 26 U.S.C. § 7431 (1982) would nevertheless preclude liability in these cases.

### FACTS AND PRIOR PROCEEDINGS

There are no disputed facts in these cases. In *Figur*, the U.S. Attorney's Office issued a press release summarizing tax eva-

sion charges against Figur. The same U.S. Attorney issued two press releases in *Peinado*, one announcing that Peinado pleaded guilty to tax evasion and another when he was sentenced for the crime. In *Lampert*, the government filed an action seeking a permanent injunction against the defendants' promotion and sale of abusive tax shelters. The U.S. Attorney and the Internal Revenue Service issued separate press releases relating the filing of that action and the investigation of the defendants.

In each instance, the taxpayer brought an action alleging that the respective press release was an unauthorized disclosures of "return information" as defined by 26 U.S.C. § 6103. The government responded that (1) a press release based solely on information contained in a public court record is not an unauthorized disclosure; and (2) even if the disclosure was unauthorized, the government acted in good faith, thereby precluding liability.

The government prevailed on motions for summary judgments. In *Figur*, the district court held that a "governmental press release disseminating return information contained in the public record does not violate § 6103." *Figur v. United States*, 662 F. Supp. 515, 518 (N.D. Cal. 1987). Similarly, the court in *Peinado* concluded that "[i]t was not the intent of Congress in enacting § 6103 to penalize the government for issuing a press release repeating information that is already a matter of public record. A press release that simply announces or broadcasts what is already known from court proceedings is not a disclosure as that term is defined in § 6103." *Peinado v. United States*, 669 F. Supp. 953, 954 (N.D. Cal. 1987). Finally, the trial judge in *Lampert* stated that a violation had occurred but held that the government was protected by its good faith interpretation of section 6103. *Lampert v. United States*, unpublished opinion, slip op. 5-11 (N.D. Cal. April 8, 1987).

## DISCUSSION

[1] Section 6103(a), 26 U.S.C. § 6103(a), of the Internal Revenue Code "lays down a general rule that 'returns' and 'return information' . . . shall be confidential." *Church of Scientology of California v. I.R.S.*, 108 S. Ct. 271, 272 (1987). The statute is designed to protect the flow of information between taxpayers and the Internal Revenue Service by controlling the disclosure of tax information by government employees. *See Stokwitz v. United States*, 831 F.2d 893, 894 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1592 (1988). The Act creates a private cause of action by taxpayers against the United States and provides for damages. 26 U.S.C. § 7431(c).

[2] There is no dispute here that the press releases disclosed "return information" as defined by section 6103(b). *See, e.g., Barrett v. United States*, 795 F.2d 446, 449 (5th Cir. 1986) (statute broadly defines term to include taxpayer's identity, the nature, source or amount of income, and whether there is an investigation). There is also no dispute that 26 U.S.C. § 6103(h)(4)(A) authorizes the disclosure of return information in judicial proceedings involving a taxpayer's civil or criminal tax liability. The government argues that once such information is lawfully disclosed in judicial proceedings, it loses its confidentiality and is no longer subject to the restrictions of section 6103. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)(court proceedings are public record).

[3] Taxpayers argue, however that section 6103(h)(4)(A) on its face applies only to disclosures *in* judicial proceedings. The disclosures at issue occurred not in court but to the press through the issuance of press releases. The taxpayers therefore contend that while the contested information could lawfully be disclosed in court, the act forecloses further dissemination of even "public record" return information.[1]

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[1]The taxpayers also contend that the press releases here contained return information that was not disclosed in the judicial proceedings. *See e.g.,*

In *Rodgers v. Hyatt*, 697 F.2d 899, 904 (10th Cir. 1983), the court accepted the taxpayers' position. There an IRS agent disclosed to others certain return information that had been the subject of his testimony in a prior court proceeding. The court held that "[e]ven assuming the loss of confidentiality in the content of the statements . . . the [later] disclosure was clearly unauthorized." *Id.* at 906; *see also Malis v. United States*, 87-1 U.S.T.C. ¶ 9212 (C.D. Cal. 1986)(citing *Rodgers* for proposition that disclosure of return information that has been made public does not preclude liability for later unauthorized disclosures of the identical return information).

Similarly, *Johnson v. Sawyer*, 640 F. Supp. 1126 (S.D. Tex. 1986), supports the taxpayers' argument. There the IRS issued a press release following Johnson's plea of tax evasion. The government argued that there was no violation of section 6103 because Johnson had no reasonable expectation of privacy concerning information already disclosed in the public record of his criminal prosecution. *Id.* at 1132. The court rejected that argument, concluding that "Congress made the language of § 6103 quite clear: any disclosure of return information is illegal 'except as authorized . . . .' " *Id.* The court, citing *Rodgers*, refused to create an additional exception to section 6103. *Id.* at 1133. In so doing, the court recognized that by strictly enforcing section 6103, the government's ability to publicize the prosecution of tax evaders is greatly hampered. *Id.* at 1133 n.18. Nevertheless, "[i]f that result is poor public policy, it is for Congress—not the Courts—to amend § 6103 to allow the issuing of such releases." *Id.*

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*Husby v. United States*, 672 F. Supp. 442, 444 (N.D. Cal. 1987)(limiting the right of subsequent disclosure to only that information actually disclosed in the judicial proceedings). The district courts here found that the information disclosed in the press releases were restatements of the allegations in the indictments or of the events that took place in open court at trial, plea hearing, or sentencing. Our review of the record convinces us that the courts' findings on this point are not clearly erroneous.

In contrast to *Rodgers* and *Johnson*, several district courts have concluded that once return information is disclosed in court, such information is no longer confidential, the taxpayer loses any privacy interests in that information, and there is no violation of section 6103 for subsequent disclosures. *See Thomas v. United States*, 671 F. Supp. 15, 16 (E.D. Wis. 1987)(IRS press release summarizing the results of tax court proceedings is not unlawful disclosure); *United States v. Posner*, 594 F. Supp. 930, 936 (S.D. Fla. 1984)(no right of privacy for information that has already been placed in public court file); *Cooper v. I.R.S.*, 450 F. Supp. 752, 755 (D. D.C. 1977)(tax return information is never again confidential once disclosed by use in a public trial). These courts reason that trial proceedings are public events and "[o]nce tax return information enters the public domain, the taxpayer no longer has any privacy interests in that information." *Thomas*, 671 F. Supp. at 16. Thus if a taxpayer's return information is lawfully disclosed in a judicial proceeding pursuant to section 6103(h)(4)(C), the information is no longer confidential and may be disclosed again without regard to section 6103. *See United Energy Corp. v. United States*, 622 F. Supp. 43, 46 (N.D. Cal. 1985)(U.S. Attorney's disclosure to newspaper reporter of information disclosed in court proceeding did not violate section 6103).

[4] We have observed that section 6103 does not create a general prohibition against public disclosure of tax information. *Stokwitz*, 831 F.2d at 896; *but see Wiemerslage v. United States*, 838 F.2d 899, 902 (7th Cir. 1988)(describing section 6103 as a "general prohibition against the disclosure of tax return information"). The taxpayers admit that anyone is free to obtain return information from public court records. They acknowledge that court records are public domain and that "[t]hose who see and hear what transpired can report it with impunity." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Nevertheless, they insist that for a government employee to disclose any return information, confidential or not, there must exist an applicable exception to section 6103(a).

[5] Only a strict, technical reading of the statute supports the taxpayers' position. *See Johnson*, 640 F. Supp. at 1132. While generally our duty is to give effect to the literal language of a statute, we are not obligated to do so when reliance on that language would defeat the purposes of the statute. *Brothers v. First Leasing*, 724 F.2d 789, 793 (9th Cir.), *cert. denied*, 469 U.S. 832 (1984). We believe that Congress sought to prohibit only the disclosure of confidential tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information. *See Thomas*, 671 F. Supp. at 16; *United Energy*, 622 F. Supp. at 46. We agree when once information is lawfully disclosed in court proceedings. "§ 6103(a)'s directive to keep return information confidential is moot." *Figur*, 662 F. Supp. at 517. Therefore we hold that once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate the Act.

AFFIRMED.[2]

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[2]We may affirm *Lampert* on this ground even though Judge Peckham did not reach the issue. *See United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981)(appellate court may affirm on any basis supported by the record), *cert. denied*, 454 U.S. 1143 (1982); *see also Rueckert v. I.R.S.*, 775 F.2d 208, 212 (7th Cir. 1985)(affirming the district court on alternative ground that disclosure at issue did not violate section 6103).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ERNEST P. LAMPERT; DELPHINE LAMPERT; ROBERT J. BURNS; JOHN P. THORNE, Plaintiffs/Apellants vs. UNITED STATES OF AMERICA, Defendant/Appellee. | Filed Oct. 21, 1988<br>No. 87-2022<br>D.C. No. CV-86-3464-RFP |
| MANUAL PEINADO, Plaintiff/Appellant, vs. UNITED STATES OF AMERICA, Defendant/Appellee. | No. 87-2395<br>D.C. No. CV-87-0075-WWS<br>ORDER |
| LAWRENCE J. FIGUR, Plaintiff/Appellant, vs. UNITED STATES OF AMERICA, Defendant/Appellee. | NO. 87-2396<br>D.C. No. CV-0737-SC |

On Appeal from the United States District Court for the Northern District of California

Before: SKOPIL and FARRIS, Circuit Judges, and BURNS* District Judge

The panel has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for rehearing en banc, and Judges Skopil and Burns recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

**Appendix C**

C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed April 8, 1987

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| LAMPERT, ET AL., | ) NO. C-86-3463-RFP |
| Plaintiffs, | ) |
| v. | ) ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT |
| UNITED STATES, | ) AND GRANTING MOTION FOR SUMMARY |
| Defendant. | ) JUDGMENT |

INTRODUCTION

Plaintiffs Renewable Power Corporation and United Financial Corporation have filed in support of the instant plaintiffs' motion for partial summary judgment and similarly oppose defendant's motion for summary judgment. This court denies plaintiffs' motion for partial summary judgment and grants defendant's motion for summary judgment. This court denies defendant's motion for sanctions.

BACKGROUND

On June 3, 1986, the government filed a complaint for a permanent injunction against the plaintiffs in a case entitled United States v. United Energy Corporation. On that day, the United States Attorneys Office and the IRS issued separate releases to the press relating, inter alia, the filing of said complaint, the investigation of the plaintiffs, and other related matters.

Plaintiffs brought the instant action alleging that the press releases issued by the two offices were unauthorized disclosures of the plaintiffs' "return" and "return information" pursuant to 26 U.S.C. section 6103, and accordingly violated the plaintiffs' rights. For these reasons, plaintiffs claim that they are entitled to damages pursuant to 26 U.S.C. section 7431.

This matter was previously brought before this court on the government's motion for summary judgment and sanctions which this court denied without an opinion on December 31, 1987. On February 25, 1987, Magistrate Wilken entered a final judgment against the plaintiffs for a permanent injunction, the suit which underlies this cause of action.

In this present action in the case, plaintiffs move for a partial summary judgment on the issue of liability and on the issue of damages relating to some disclosures. The government cross-claims for summary judgment, to dismiss the complaint for failure to state a claim for which relief can be granted, and for sanctions. The government states that the issue of whether the U.S. can issue a press release to announce the filing of a civil complaint is ripe for decision: no

further discovery or evidentiary hearing is necessary.

DISCUSSION

The plaintiffs move for partial summary judgment on the issue of liability and on the issue of damages for two of the alleged disclosures.

I. Partial Summary Judgment:

Rule 56(c) of the Fed. R. Civ. Pro. provides that "a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." American Training Services Inc. v. Commerce Union Bank, 415 F. Supp. 1101, 1106 (M.D. Tenn. 1976), aff'd, 612 F.2d 580 (5th Cir. 1976). A court also may enter a pretrial adjudication under Rule 56(d) as to the extent to which the amount of damages is not in controversy. See Central States, S.E. & S.W. Areas Pension & Health &

Welfare Funds v. McNamara Motor Exp., Inc., 503 F. Supp. 96 (D.C. Mich. 1980).

II. Disclosure under section 6103:

Section 7431 authorizes civil actions against the United States "if any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103...." 26 U.S.C. section 7431(a)(1). This court has jurisdiction of the subject matter herein and over the United States of America. 26 U.S.C. section 7431(a); William A. Malis v. United States. et al., No. CV-83-7767 (CBM) (C.D. Cal. 1986) as reported by Litigation Reporting Service.

Section 6104 states that returns and return information shall be confidential and shall not be disclosed except as authorized. One such exception for

disclosure is "in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only... if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding." 26 U.S.C. section 6103(h)(C).

Return information encompasses "any information gathered by the IRS regarding a person's tax liability" and includes the taxpayer's identity, and the fact that the taxpayer is under investigation or subject to further investigation. Johnson v. Sawyer, 640 F. Supp. 1126, 1131 (S.D. Tex. 1986). The press releases in the instant case included the identity of plaintiffs, information regarding the investigation concerning

the plaintiffs, the source of their income, and data gathered during the investigation. There is no dispute over the fact that the releases contained return information as specified in the code.

Defendant argues that, to the extent that section 6103 authorizes disclosures in judicial proceedings, then the issuance of press releases which restate the same information contained in the pleadings in those proceedings does not violate this confidentiality provision. Defendant maintains that the information contained in the government's complaint in the case, United States v. United Energy Corporation, et al., filed the same day. The government's argument turns on the fact that since the complaint itself is public information, then any disclosures by the government that restate this public information

should not be illegal. The government also argues that it has a right and an obligation to announce to the public the filing of a civil complaint or criminal indictment, especially in view of the nature of the injunctive relief sought in the United Energy Corporation complaint and its impact on thousands of taxpayers who might have claimed tax deductions relating to their investments in United States Corporation.

Plaintiffs' argument focuses on the literal language of section 6103 which provides an exception for those disclosures that were made "in a Federal... judicial... proceeding." By issuing press releases restating the information contained in their complaint, the government clearly has not limited its disclosures to those made in a judicial proceeding. Plaintiffs argue that the exception in section

6103(h)(4)(A) reflects a balance between competing interests: the legitimate law enforcement needs of the government, as opposed to the individuals' right to confidentiality of their tax returns. Plaintiffs contend that while disclosure of return information within the corners of a complaint by the government is valid, the decision to publicize this information independently by means of press releases is not.

Plaintiffs rely for their argument on recent cases which have interpreted section 6103 literally and have found that such a press release is a violation of section 6103. The pivotal case which favors plaintiffs, Johnson v. Sawyer, 640 F. Supp. 1126 (S.D. Tex. 1986), was brought to the attention of this court in post hearing supplemental memorandum, dated 28 August 1986; the case itself was issued in a Memorandum and Order on 14

August 1986; and the hearing in this court was held on 25 August 1986. As the plaintiffs have noted, Johnson v. Sawyer was a case of first impression as to whether press releases constituted unauthorized disclosures.

Assuming arguendo that the plaintiffs' and the Johnson court's interpretation of the statue is currently correct, plaintiffs must then prove bad faith on the defendant's part. See Johnson v. Sawyer, 640 F. Supp. at 1133.

II. Good Faith Defense:

Section 7431(b) provides a defense to liability under section 6103: it provides that no liability can arise under this section with respect to any disclosure which results from a "good faith, but erroneous, interpretation of section 6103." 26 U.S.C. section 7431(b). As plaintiff points out, Congress did not enumerate within section 7431 what

standard of good faith is to be applied, but the courts who have addressed this issue have applied the standard taken from the Supreme Court decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982). See Johnson v. Sawyer, 640 F. Supp. at 1133; Bueckert v. Gore, 507 F. Supp. 1238, 1242 (N.P. Ill. 1984), aff'd, 775 F.2d 208 (7th Cir. 1985); Davidson v. Brady, 559 F. Supp. 456 (M.D. Mich 1983), aff'd, 732 F.2d 552, 553 (6th Cir. 1984). This standard reads: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Marlow v. Fitzgerald, 457 U.S. at 313. The Court recognized that permitting a qualified immunity defense for high executives was a reflection of

an attempt to balance competing values: "not only the importance of a damages remedy to protect the rights of citizens, (citation omitted), but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official immunity." Id. at 807.

Common law good faith immunity is generally treated as an affirmative defense; however, the Sixth circuit reasoned that the affirmative statement by Congress that "[n]o liability shall arise" if good faith is present, rendered bad faith an element of a section 7431(b) action.[1] Davidson v. Brady, 732 F.2d 552, 553 (6th Cir. 1984). The court found that the Harlow policies of "avoiding excessive disruption of government and permitting the early resolution of many insubstantial claims," militated in favor

of interpreting section 7431 as "requiring a plaintiff to plead facts sufficient to establish bad faith." Id.

The plaintiff have alleged "bad faith" on the part of the government in this action. Their argument centers on a literal interpretation of the wording of section 7431, namely, on the meaning of "good faith interpretation of the law." Plaintiffs argue that implicit within the meaning is that some overt act of interpretation of the law must have occurred. Plaintiffs offer the deposition

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1 The court in Davidson was discussing this issue as applied to section 7217. Id. The Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. 97-248, 96 Stat.324, repealed section 7217 as to disclosures made after September 3, 1982. The Act created section 7431 to be used in place of section 7217, which allows suits for damages to be brought against the United States instead of against "any person" which 7217 had allowed. The wording of the defense is, however, otherwise the same. See Huckaby v. United States Dept. of Treasury, I.R.S., 794 F.2d 1941, 1041, 1048 n. 6, reh'g denied, 804 F.2d 297 (5th Cir. 1986).

of Larry Wright, Public Affairs Counsel for the IRS, the individual who prepared and issued the press release in question for the IRS. Plaintiffs allege that because Mr. Wright did not: review his materials from his training courses, discuss the release with any other IRS personnel, read the IRS Service Manual, review the applicable statutes or regulations, and have the press releases reviewed by a disclosure officer, his disclosure did not result from an erroneous interpretation of section 6103; and therefore, as a matter of law, Mr. Wright could not have acted in good faith.

The defense points out that Mr. Wright testified that he believed that information that is already a matter of public record could be included in a press release. We also testified that the only information he used to draft the

release was a copy of the complaint, a fact sheet prepared by the Department of Justice, and information already in the general public record, some of which he knew as part of the history of the case. This court also notes that Mr. Wright is not an attorney. (Dep. 25) Mr. Wright also stated that he did not review the press release with a disclosure officer because that was not standard practice. (Dep. 30) Mr. Wright was asked if he had taken the statue, 6103, point-by-point and reviewed it prior to the release. (Dep. 31) He replied in the negative but also stated that he periodically , at lease once a year, reviewed the continuing professional education materials on the subject. (Dep. 31) The person deposing stressed whether or not Mr. Wright had reviewed these materials one month prior to issuing this release. (Dep. 30, -31) Mr. Wright's responses

indicated that he reviewed this press release and any other press release for conformity with the disclosure regulations, but "not by reviewing or reading the disclosure regulations in great detail each time I put out a press release." (Dep. 32) Mr. Wright indicated that prior to the release he provided a copy of the same to jay Weill, Asst. U.S. Attorney. (Dep. 32)

The second press release was issued by the United States Attorney's Office. Defendant contends that the Department of Justice has promulgated specific regulations in the Code of Federal Register concerning the release of information by department personnel relating to criminal and civil proceedings and that these regulations were followed in this case. Defendant argues that the press releases only refer to matters in the public record which a

reasonable person would expect to be disseminated by means of a public communication.

A public official acts in good faith if his "conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Marlow v. Fitzgerald, 457 U.S. at 810. The Court noted that the "good faith" defense involved both an objective and a subjective aspect and that the subjective component referring to "permissible intentions" often conflicted with its admonition that insubstantial claims should not go to trial. Id. at 815-16. To counteract an investigation into an official's subjective good faith which would involve a question of fact that inherently required resolution by a jury, the court found that on a motion for summary judgment a judge could appropriately

determine the currently applicable law and whether that law was clearly established at "the time an action occurred." Id. at 818. Thus, the subjective good faith standard becomes objective and involves an appraisal of the objective reasonableness of an official's conduct, as measured by reference to clearly established law. The Supreme Court also stipulated in Harlow that "if the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful." Id.

As noted above, the pivotal case which favors plaintiffs, Johnson v. Swayer, 640 F. Supp. 1126 (S.D. Tex. 1986), was brought to the attention of this court in a post hearing supplemental

memorandum. Johnson v. Swayer was a case of first impression as to whether press releases constituted unauthorized disclosures. Until that time, as defendant correctly argues, case law had supported its position. This court finds that law in the instant case incorporates not only the relevant statutes but also statutory interpretation. We find that the case law at the time of the press release supported the defendant's position and that the officials involved in the instant case could not reasonably be expected to anticipate subsequent legal developments, nor could they fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. We find that in the light of the then existing law, the defendants acted in good faith: (1) the agents involved thought that the prevailing law did not class press releases which

restated the allegations in a publicly filed complaint as a violation of section 6103; (2) the agents followed longstanding IRS and Department of Justice practices and regulations concerning press releases; and (3) although the Code had provided for civil liability concerning disclosures in violation of section 6103 since 1977, no case could have been found holding that issuing a press release violated section 6103. Although as plaintiffs argue, the Johnson court found that similar circumstances did not exonerate bad faith, we find that to apply the Johnson rationale to the instant case would, in effect, be applying new precedent, which is at best persuasive, retroactively. The Supreme Court has specifically held that a court cannot do such in determining whether or not the government acted in "bad faith": instead in

determining the objective reasonableness of an official's conduct, it must be measured by reference to clearly established law at the time of the action complained of. Marlow v. Fitzgerald, 457 U.S. at 818. For these reasons, we deny plaintiffs' motion for partial summary judgment adjudication and grant the defendant's cross-motion for summary judgment finding that after a review of the submitted materials there remains no genuine issues as to any material fact and that the defendant is entitled to summary judgment as a matter of law upon the plaintiffs' failure to establish bad faith.

We deny defendant's motion for sanctions, finding that plaintiffs' claim was not frivolous in light of the development of the law on this issue.

CONCLUSION

This court denies plaintiffs' motion for partial summary adjudication and grants defendant's cross-motion for summary judgment. This court denies defendant's motion for sanctions. SO ORDERED.

Dated: April 8, 1987

/s/ Robert F. Peckham

CHIEF UNITED STATES

DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed June 23, 1987

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| MANUAL PEINADO,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | NO. C-87-0075-WWS<br><br>ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT |

This is an action for damages against the United States pursuant to 26 U.S.C. Section 7431(a)(1). The plaintiff claims that damages should be awarded him because the United States Attorney's Office issued two press releases; one announcing that the plaintiff had plead guilty on January 27, 1986 to two counts of income tax evasion in United States v. Manual Peinado, CR-85-0302-TEH; and a second one when the plaintiff was sentenced in that criminal case on march 3, 1986. Plaintiff claims these two

press releases violated the disclosure provisions of Section 6103 since they allegedly disclosed return or return information about plaintiff.

The plaintiff Manual J. Peinado was indicted on April 3, 1985 in this district court for two counts of tax evasion and two counts of preparing false federal income tax returns. The trial of this matter occurred in October 1985. The defendant took stand in his own defense. The trial ended in a mistrial.

On January 27, 1986 the defendant plead guilty in the criminal case to two counsel of tax evasion. After the plea was taken, the U.S. Attorney's Office issued a press release announcing the plea. The defendant was sentenced on March 3, 1986. On that same day the U.S. Attorney's Office issued a press release announing (sic) the imposition of sentence. Plaintiff claims that the

United States cannot issue press releases announcing what has occurred in court proceedings in criminal tax cases without violating Section 6103. Accordingly, he seeks damages under Section 7431.

Section 7431 authorizes civil actions against the United States "if any officer or employee of the United States knowingly, or be reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103. . . ." Section 7431(a)(1) No liability shall arise under this section with resect to any disclosure which results from a good faith, but erroneous interpretation of section 6103. Section 7431(b). Plaintiff's claim for damages under section 7431(a) fails because a violation of section 6103, i.e., an unauthorized disclosure of return or return information, must occur before

damages can be awarded under section 7431(c). There has been no violation of section 6103. The information "disclosed" in the press releases at issue were, in fact, a restatement of the allegations in the indictment or what occurred in open court during the trial or at either the hearing on the plea or sentencing of the plaintiff.

It was not the intent of Congress in enacting section 6103 to penalize the government for issuing a press release repeating information that is already a matter of public record. A press release that simply announces or broadcasts what is already known from court proceedings is not a disclosure as that term is defined in section 6103. Moreover, in view of the prior ruling of Judge Peckham in United Energy Corp. v. United States, 622 F.Supp. 43 (1985), the government

acted in good faith in issuing the press releases at issue here.

In accordance with the foregoing, it is hereby Ordered that:

(1) Defendant's cross-motion for summary judgment is Granted;

(2) Plaintiff's motion for partial summary judgment is Denied.

DATE:23 June 1987 /s/William W. Schwarzer
UNITED STATES
DISTRICT JUDGE

**Appendix E**

E-1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed May 19, 1987

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| LAWRENCE J. FIGUR,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | NO. C-87-0737-SC<br><br>ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT |

Plaintiff brings this action pursuant to 26 U.S.C. Section 7431 of the Internal Revenue Code ("the Code"). Plaintiff asserts that defendant violated 26 U.S.C. Section 6103 by making an unauthorized disclosure of "return information."

On July 22, 1985, U.S. Attorney Joseph P. Russoniello filed a criminal information charging plaintiff with

conspiracy to defraud the United States and tax evasion. Plaintiff plead guilty to both counts. On the same day, the U.S. Attorney's Office issued a press release summarizing the charges against plaintiff contained in the criminal information. Plaintiff alleges that the U.S Attorney's July 22, 1985 press release amounted to an illegal disclosure of his return information.

The matter is presently before the court on defendant's motion for summary judgment and plaintiff's motion for partial summary judgment. Defendant contends its press release, based soley (sic) on information contained in the public record, does not amount to an unauthorized disclosure of plaintiff's return information. In the alternative, defendant maintains its issuance of the press release resulted from defendant's good faith interpretation of the

applicable statutes. Plaintiff moves for partial summary judgment arguing that defendant's press release does amount to an unauthorized disclosure of return information notwithstanding its foundation in the public record. Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex Corp. v. Myrtle Nell Catrett, 477 U.S. ____, 91 L.Ed.2d 265 (1986). Weighing evidence,

determining credibility, and drawing inferences from facts remain jury functions which may not be undertaken by the trial judge. See, Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 106 S.CT. 2505, 2516 (1986).

26 U.S.C. Section 7431(a)(1) authorizes civil actions against the United States "if any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 . . . ." No liability shall arise under section 7431 with respect to any disclosure which results from a good faith, but erroneous interpretation of section 6103. 26 U.S.C. Section 7431(b).

Section 6103 of the Code provides that:

> [r]eturns and return information shall be confidential, and except as authorized by this title . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

26 U.S.C. Section 6103(a). Section 6103(b)(2 defines "return information" broadly, "encompassing any information gathered by the IRS regarding a person's tax liability." Johnson v. Sawyer, 640 F.Supp. 1126, 1131 (S.D. Tex. 1986). More specifically, "return information" includes a taxpayer's identity and the nature, source and amount of a taxpayer's income and liabilities. 26 U.S.C. Section 6103(b)(2)(A). Section 6103(b)(8) defines "disclosure" as "the making known to any person in any manner whatever a return or return information." Section 6103's prohibition against disclosure of returns and return

information has a number of statutory exceptions. One exception authorizes disclosure of return information "in a Federal or State judicial or administrative proceeding pertaining to tax administration." 26 U.S.C. Section 6103(h)(4).

In the present case, several issues are not in dispute. First, plaintiff does not dispute defendant's right to disclose plaintiff's return information in the criminal information. Such a disclosure falls directly within the statutory exception allowing for disclosures in judicial proceedings dealing with a taxpayer's criminal liability. See, 26 U.S.C. Section 6104(h)(4). Second, plaintiff does not dispute that any return information contained in the criminal information became a matter of public record. See, Nixon v. Warner Communicaton, 435 U.S.

589, 587 (1978)(what transpires in open court is a matter of public record). Lastly, the parties do not dispute that defendant's July 22, 1985 press release contained return information. The press release disseminated information concerning plaintiff's identity, income and liabilities gathered by the IRS. See, 26 U.S.C. Section 6103(b)(2). Thus, the central issue is whether defendant's press release disseminating plaintiff's return information contained in the public record violates Section 6103.

The court finds that Section 6103 does not prevent defendant from issuing a press release reporting return information contained in the public record. Congress enacted Section 6103 to protect taxpayers' "reasonable expectation of privacy" in the information provided to the government through the voluntary assessment system.

S. Rep. No. 938, 94th Cong., 2d Sess. 317, reprinted in 1976 U.S. Code Cong. & Admin. News 3747. To that end, Section 6103(a) pronounces that "[r]eturns and return information shall be confidential." 26 U.S.C. Section 6103(a). However, once return information has been disclosed in a judicial proceeding, a taxpayer has no reasonable expectation of privacy in that information. United States v. Posner, 594 F.Supp. 930, 936 (S.D. Fla. 1984). Thus, as to return information in the public record, Section 6103(a)'s directive to keep return information confidential is moot.(1) For example, a government official cannot "disclose" or "make known" return information in the public record. The act of "disclosure" presupposes confidentially or at least limited access to the material revealed. By its very nature, information in the

public record is not confidential, and once disclosed to the public, cannot regain its confidentiality. Cooper v. IRS, 450 F.Supp. 752, 755 (D.C. 1977).

Plaintiff contends that the government can disclose return or return information only in those situations outlined in Section 6103. Plaintiff cites as authority Rogers v. Hyatt, 697 F.2d 889 (10th Cir. 1983). In Rogers, the defendant argued that return information in the public record lacked

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1 Apparently, Congress recognized this conclusion when setting up safeguards protecting the confidentiality of return information. Section 6103(p)(4) requires government agencies to establish certain confidential safeguards as a condition for the receipt of return information. However, this requirement for confidential safeguards does not apply to return information disclosed in a judicial proceeding and thus made a part of the public record. 26 U.S.C. Section 6103(p)(4).

confidentiality and thus could be disseminated without violating Section 6103.

The Tenth Circuit rejected the defendant's argument defining the issue as follows:

> [t]he issue in this case . . . is not the loss of "confidentiality" or "privacy" but, rather, whether under the circumstances, Hyatt made an unauthorized disclosure of tax return information in violation of Section 6103. Even assuming the loss of confidentiality in the content of the statement, we hold the . . . disclosure was unauthorized.

Rogers, 697 F.2d at 988; see also, Johnson v. Sawyer, 640 F.Supp. 1126, 1128-1132 (S.D. Tex 1986)(court found press release containing return information in public record an unauthorized disclosure under Section 6103) and, Malis v. U.S., 87-1 Stand. Fed. Tax Rep. (CCH) Para. 9212, at 87,351 (C.D. Cal. 1986)(court concluded that return information in public record "does

not preclude liability for later unauthorized disclosures of the identical return information").

The court rejects plaintiff's contention. Rogers and its progeny ignore the mootness of protecting the taxpayer's privacy concerning return information contained in the public record. Instead, these cases apply Section 6103 mechanically disregarding the section's raison d'etre: to protect the taxpayers' "reasonable expectation of privacy." See e.g., Johnson, 640 F.Supp. at 1132-33. In addition, these cases all assume that "disclosure" of publicly held information is possible. As previously explained, the act of "disclosure" or "making known" presupposes confidentiality or at least limited access to the material disclosed. By its very nature, information in the public record is not confidential and is freely

accessible to anyone. See e.g., Craig v. Harney, 331 U.S. 367, 374 (1974).

Plaintiff also asserts that defendant did not derive all his return information released to the press from the public record. Plaintiff does not state specifically what information contained in the press release he questions.

The court finds no merit in plaintiff's assertion. Comparison between the criminal information and the press release shows that all return information contained in the press release derived from the criminal information. See, Declaration of Robert C. Fourr Para. 11-15, Exs. A & C.

Lastly, plaintiff argues that the court should allow him more time for discovery.

The court rejects plaintiff's argument. In deciding this matter, the

court relies on the facts either undisputed or lacking substantial controversy. Therefore, the court finds any discovery contemplated by plaintiff immaterial.

Accordingly, the court grants defendant's motion for summary judgment and denies plaintiff's motion for partial summary judgment. To sum, the court finds that a governmental press release disseminating return information contained in the public record does not violate Section 6103. The court further finds that defendant's July 22, 1985 press release disseminated return information already in the public record.

In accordance with the foregoing, it is hereby ordered that:

(1) defendant's motion for summary judgment is granted; and,

(2) plaintiff's motion for partial summary judgment is denied.

Dated: May 19, 1987

/s/ Samual Conti

United States

District Judge